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9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN FRANCISCO DIVISION**

12 WAYMO LLC,) Case No.: 17-cv-00939 WHA
13 Plaintiff,)
14 v.) **Court-Ordered Fifth Amendment
15 UBER TECHNOLOGIES, INC., et al.,**)
16 Defendants.)
17

18 Waymo LLC has propounded a subpoena seeking records from witness Anthony
19 Levandowski. *See* Dkt. 212-1. The Court quashed some of Waymo's document demands, but
20 enforced others. Dkt. 230 (4/12/2017 Tx) at 70-72. As the Court is aware, however, Mr.
21 Levandowski has asserted that the compelled production of certain records may implicate his
22 Fifth Amendment privilege against self-incrimination. *See id.* at 68-84. At the April 12, 2017
23 hearing, the Court directed that, in order for Mr. Levandowski to vindicate his Fifth Amendment
24 rights, he must submit to the Court an *ex parte* privilege log and brief explaining why the
25 production of particular records may not be compelled. *Id.* at 77-84.
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1 In compliance with the Court’s order, Mr. Levandowski has provided an *ex parte*
 2 submission for the Court’s *in camera* review detailing records — if any — that Mr. Levandowski
 3 may not constitutionally be compelled to produce. Mr. Levandowski also submits this brief to
 4 comply with the Court’s directive that he “give the other side enough of the argument so that
 5 they can respond to it.” Dkt. 230 (4/12/2017 Tx) at 79. In keeping with that order, below we
 6 discuss the general legal principles that should guide the Court’s *in camera* consideration of any
 7 Fifth Amendment privilege log submitted by Mr. Levandowski.¹

9 **I. MR. LEVANDOWSKI’S FIFTH AMENDMENT RIGHTS ARE IMPLICATED**

10 The Fifth Amendment privilege not to be a witness against oneself is a central tenet of
 11 our democracy. *Quinn v. United States*, 349 U.S. 155, 161 (1955). “[A]ny compulsory
 12 discovery by extorting the party’s oath . . . to convict him of crime . . . is contrary to the
 13 principles of a free government It may suit the purposes of despotic power, but it cannot
 14 abide the pure atmosphere of political liberty and personal freedom.” *Malloy v. Hogan*, 378 U.S.
 15 1, 9 n.7 (1964); *see also United States v. Bright*, 596 F.3d 683, 692 (9th Cir. 2010) (“The Fifth
 16 Amendment grants persons the privilege not to provide the State with [self-incriminatory]
 17 evidence of a testimonial or communicative nature.” (quotation marks omitted, alteration in
 18 original)).

21 A person can invoke the Fifth Amendment’s protections in any proceeding — be it “civil,
 22 criminal, administrative, judicial, investigative or adjudicatory.” *Doe ex rel. Rudy-Glanzer v.*
 23

24 ¹ The *in camera* submission of information over which a litigant claims a Fifth Amendment
 25 privilege does not destroy the claimed privilege. *United States v. Bright*, 596 F.3d 683, 691 (9th
 26 Cir. 2010) (citing *United States v. Zolin*, 491 U.S. 554, 569 (1989)). However, because the Court
 27 has required Mr. Levandowski to submit a Fifth Amendment privilege log in order to press his
 28 privilege claims, revelation of any information that may be disclosed in this log would constitute
 a compelled testimonial disclosure in violation of Mr. Levandowski’s Fifth Amendment rights.

1 *Glanzer*, 232 F.3d 1258, 1263 (9th Cir. 2000). In the civil context, “the invocation of the
 2 privilege is limited to those circumstances in which the person invoking the privilege reasonably
 3 believes that his disclosures could be used in a criminal prosecution, or could lead to other
 4 evidence that could be used in that manner.” *Id.* The “privilege against self-incrimination does
 5 not depend upon the *likelihood*, but upon the *possibility*, of prosecution and also covers those
 6 circumstances where the disclosures would not be directly incriminating, but could provide an
 7 indirect link to incriminating evidence.” *Id.* (emphasis in original).

8 Courts have interpreted the Fifth Amendment’s protections broadly, holding that the
 9 privilege applies when an answer to a question could:

- 10 • “[P]rovide an indirect link to incriminating evidence.” *Doe ex rel. Rudy-Glanzer*, 232
 11 F.3d at 1263.
- 12 • “[P]rovide a lead or clue to evidence having a tendency to incriminate.” *United States v.*
 13 *Neff*, 615 F.2d 1235, 1239 (9th Cir. 1980).
- 14 • Disclose “a fact that could serve as a link in a chain of circumstantial evidence from
 15 which guilt might be inferred” or a “fact” that “might furnish a lead to a bit of evidence
 16 useful to the prosecution.” *Maffie v. United States*, 209 F.2d 225, 228 (1st Cir. 1954).
- 17 • “[G]ive a prosecutor a starting point from which he might proceed step by step to link the
 18 witness with criminal offenses.” *J.C. Penney Life Ins. Co. v. Houghton*, No. 86-2637,
 19 1986 U.S. Dist. LEXIS 16072 at *9 (E.D. Pa. Dec. 23, 1986).

20 In short, the link-in-the-chain test is “broadly protective” and must be “liberally construed” by
 21 the courts. *United States v. Chandler*, 380 F.2d 993, 997, 1000 (2d Cir. 1967).

22 Mr. Levandowski’s Fifth Amendment privilege is quite clearly implicated by the
 23

1 allegations in this case. Waymo's complaint alleges that Mr. Levandowski was involved in
 2 "steal[ing]" and "misappropriat[ing]" intellectual property. *See, e.g.*, Dkt. 23 ¶¶ 10, 11 & p. 11
 3 § IV.D. These claims conjure the threat of criminal sanction under 18 U.S.C. § 1832 or other
 4 similar federal or state statutes. Accordingly, merely by virtue of the accusations themselves,
 5 there is a "possibility" of prosecution, and Mr. Levandowski cannot be compelled to testify —
 6 explicitly or implicitly — about whether he took alleged trade secrets when he departed
 7 Waymo's employ, or about any other topics that might tend to inculpate him.²

9 **II. THE FIFTH AMENDMENT PROHIBITS THE COMPELLED DISCLOSURE OF**
 10 **RECORDS WHEN THE DISCLOSURE WOULD HAVE TESTIMONIAL**
 11 **ASPECTS**

12 As this Court previously recognized, it is "uncontroversial" that an individual may invoke
 13 the Fifth Amendment privilege in responding to a request for the production of documents. Dkt.
 14 202 at 6. Even when the contents of a document are themselves not privileged, the act of
 15 producing the document may implicate the Fifth Amendment privilege:

16 The act of producing evidence in response to a subpoena . . . has communicative
 17 aspects of its own, wholly aside from the contents of the papers produced.
 18 Compliance with the subpoena tacitly concedes the existence of the papers
 19 demanded and their possession or control by the [subpoenaed witness]. It also
 20 would indicate the [witness]'s belief that the papers are those described in the
 21 subpoena.

22 *Fisher v. United States*, 425 U.S. 391, 410 (1976); *see also United States v. Hubbell*, 530 U.S.
 23 27, 32-36 (2000) (holding that, in response to a subpoena for documents, a subpoenaed witness

24 ² The question whether the allegations in the complaint are accurate, of course, remains to be
 25 litigated — but that question is irrelevant to the issues before the Court in this motion, as "one of
 26 the Fifth Amendment's basic functions . . . is to protect innocent men . . . who otherwise might
 27 be ensnared by ambiguous circumstances." *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (quoting
Grunewald v. United States, 353 U.S. 391, 421 (1957), quotation marks omitted). "[T]ruthful
 28 responses of an innocent witness, as well as those of a wrongdoer, may provide the government
 with incriminating evidence from the speaker's own mouth." *Id.*

1 may refuse to produce because “the act of production itself may implicitly communicate
 2 statements of fact,” such as admissions that “the papers existed, were in the [witness’s]
 3 possession or control, and were authentic”); *United States v. Doe*, 465 U.S. 605, 612 (1984)
 4 (“Although the contents of a document may not be privileged, the act of producing the document
 5 may be.”). “By producing documents in compliance with a subpoena, the witness admits that the
 6 documents exist, are in his possession or control, and are authentic. These types of admissions
 7 implicitly communicate statements of fact that may lead to incriminating evidence.” *Doe v.*
 8 *United States (In re Grand Jury Subpoena)*, 383 F.3d 905, 909 (9th Cir. 2004).

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10 **III. THE “FOREGONE CONCLUSION” INQUIRY FOCUSES ON INFORMATION**
 11 **KNOWN TO THE GOVERNMENT**

12 In cases in which the “existence and location” of the documents under subpoena are a
 13 “foregone conclusion” and the witness “adds little or nothing to the sum total of the
 14 Government’s information by conceding that he in fact has the [documents],” then no Fifth
 15 Amendment right is implicated because the “question is not of testimony but of surrender.”
 16 *Fisher*, 425 U.S. at 411 (quoting *In re Harris*, 221 U.S. 274, 279 (1911)); *see also Bright*, 596
 17 F.3d at 692; *In re Grand Jury Subpoena*, 383 F.3d at 910.

18 When the government seeks records from a witness who may have a Fifth Amendment
 19 privilege, the government must establish the predicates of the “foregone conclusion” exception:

20
 21 For th[e] foregone conclusion exception to apply, the government must establish
 22 its independent knowledge of three elements: the documents’ existence, the
 23 documents’ authenticity and respondent’s possession or control of the documents.
 24 The government bears the burden of proof and must have had the requisite
 25 knowledge before issuing the summons or subpoena.

26 *Bright*, 596 F.3d at 692 (citation omitted); *see also In re Grand Jury Subpoena*, 383 F.3d at 911
 27 (“It is the quantum of information possessed by the government before it issues the relevant

1 subpoena that is central to the foregone conclusion inquiry.” (quotation marks omitted)). “[T]he
 2 government is required . . . to establish the existence of the documents sought and [the witness]’s
 3 possession of them with ‘reasonable particularity’ before the existence and possession of the
 4 documents could be considered a foregone conclusion and production therefore would not be
 5 testimonial.” *In re Grand Jury Subpoena*, 383 F.3d at 910 (quoting *Hubbell*, 530 U.S. at 44).
 6 “[I]t is the government’s knowledge of the existence and possession of the actual documents, not
 7 the information contained therein, that is central to the foregone conclusion inquiry.” *Id.*
 8 Similarly, “[t]he authenticity prong of the foregone conclusion doctrine requires the government
 9 to establish that it can independently verify that the compelled documents ‘are in fact what they
 10 purport to be.’” *Id.* at 912 (quoting *United States v. Stone*, 976 F.2d 909, 911 (4th Cir. 1992)).
 11 “Independent verification not only requires the government to show that the documents sought to
 12 be compelled would be admissible independent of the witness’ production of them, but also
 13 inquires into whether the government is compelling the witness to use his discretion in selecting
 14 and assembling the responsive documents, and thereby tacitly providing identifying information
 15 that is necessary to the government’s authentication of the subpoenaed documents.” *Id.*
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17 This is a civil case, of course, and the government is not a litigant before this Court.
 18 Nonetheless, the “foregone conclusion” inquiry has the same focus: since the fundamental issue
 19 is whether production of records might be *incriminating*, the question in analyzing Mr.
 20 Levandowski’s privilege is whether the testimonial aspects of production would provide *the*
 21 *government* with additional information about the existence, authenticity, possession or control
 22 of records that it did not otherwise have at the time the subpoena was issued. *See GE v. Liang*,
 23 No. CV 13-08670 DDP (VBKx), 2014 U.S. Dist. LEXIS 36243 at *13-15 (C.D. Cal. Mar. 19,
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 25
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1 2014); *eBay, Inc. v. Digital Point Solutions, Inc.*, No. C 08-4052 JF (PVT), 2010 U.S. Dist.
2 LEXIS 7997 at *21-22 (N.D. Cal. Jan. 12, 2010); *see also Henry v. Sneiders*, 490 F.2d 315, 317
3 (9th Cir. 1974).

4 Undersigned counsel is not aware of any active government investigation into the matters
5 at issue in this case, and the record currently before this Court does not evidence one.
6 Accordingly, essentially any revelation by Mr. Levandowski about the existence, authenticity,
7 possession or control of records would potentially add to the government's quantum of
8 information. To the extent such information has the potential to be incriminating — either
9 because the information is itself inculpatory in some way or because it might provide a
10 prosecutor with a clue or an indirect link in a chain to inculpatory information — Mr.
11 Levandowski is privileged under the constitution to refuse to provide the implicit testimony that
12 would be involved in producing the records.

13 In the privilege log (submitted *ex parte* for *in camera* review), we describe any records
14 that may — or may not — exist as to which Court-ordered production would violate Mr.
15 Levandowski's Fifth Amendment rights.

16 Date: April 19, 2017

17 Respectfully submitted,

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